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Stop...in the Name of Identification: The Supreme Court Approves Stop and ID

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Stop . . . in the Name of Identification: The Supreme Court Approves "Stop and ID"

Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County[1]

I. INTRODUCTION

In *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, the United States Supreme Court directly confronted the Fourth and Fifth Amendment concerns inherent in "Stop and ID" statutes, answering questions that it had declined to address in previous challenges to these laws.[2] "Stop and ID" statutes provide police officers the power to demand that a suspect provide his or her name, address, and an explanation of conduct, if the officer has reasonable suspicion that the suspect has committed, is committing, or is about to commit a crime.[3]

The Court viewed Hiibel's constitutional challenges to the application of Nevada's "Stop and ID" statute in light of its previous considerations of similar laws.[4] The Court had previously focused on vagueness issues and discussed *Terry* concerns including reasonable suspicion,[5] but left open some questions about the effect of reasonable suspicion, probable cause, individual privacy, and self-incrimination on "Stop and ID" laws.[6] The Court essentially balanced the government's claim of necessity for law enforcement against the individual's right to privacy in favor of the former.[7] Most importantly, but most easily overlooked, the Court focused on the initial reasonableness of the stop and the reasonableness of the relationship between the identification request and the initial encounter.[8]

The Court's reasoning triggered the most criticism from the dissent on self-incrimination grounds.[9] The dissent also questioned the statute's justification in light of previous precedent.[10] Beyond the policy debate surrounding the necessity of "Stop and ID" laws, which propoents justify as promoting officer safety and respect, the Court did not determine just how far compelled

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1. 542 U.S. 177 (2004).
2. *Id.*
3. *See, e.g.*, 725 ILL. COMP. STAT. 5/107-14 (1991); KAN. STAT. ANN. § 22-2402.1 (1995); MO. REV. STAT. § 84.710.2 (2000); N.Y. CRIM. PROC. LAW § 140.50.1 (McKinney 2004).
4. *Hiibel*, 542 U.S. at 183-84.
5. *See infra* notes 59-62 and accompanying text.
6. *Hiibel*, 542 U.S. at 183-84.
7. *Id.* at 187-88.
8. *Id.* at 188-89.
9. *Id.* at 192-96 (Stevens, J., dissenting).
10. *Id.* at 197-99 (Breyer, J., dissenting).

identification laws may go in allowing officers to question a suspect with no additional suspicion.[11]

II. FACTS AND HOLDING

Larry D. Hiibel was arrested during an officer's response to a reported assault.[12] A concerned citizen directed the officer to a truck where he had seen a man strike a woman.[13] The officer observed skid marks suggesting that the truck "had been parked in a sudden and aggressive manner."[14] The officer saw Hiibel standing outside the truck and thought Hiibel was intoxicated based on his mannerisms, speech, odor, and the appearance of his eyes.[15] Hiibel's daughter was in the passenger seat.[16] Hiibel refused the officer's request for identification, instead challenging the officer to take him to jail.[17] According to the officer, he arrested Hiibel after eleven failed requests for identification and increased aggressiveness by Hiibel.[18]

The police charged Hiibel with obstructing and delaying a police officer in attempting to discharge his duty in violation of Nevada law[19] after Hiibel's failure to submit to the officer's request for identification pursuant to Nevada's "Stop and ID" law.[20] Hiibel was convicted and sought reversal of the convic-

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11. *See id.* at 177-88.

12. Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County, 59 P.3d 1201, 1203 (Nev. 2002).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Nevada Revised Statutes Section 199.280 (2003) provides, in pertinent part:

> A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished . . . [w]here no dangerous weapon is used in the course of such resistance . . . for a misdemeanor.

20. *Hiibel*, 59 P.3d at 1203. *See* NEV. REV. STAT. § 171.123 (2003). The statute provides, in pertinent part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime. . . .
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

NEV. REV. STAT. § 171.123.

tion,[21] arguing that the district court's application of the law to his encounter with the police officer violated his Fourth[22] and Fifth[23] Amendment rights.[24] Hiibel argued that the statute circumvented the Fourth Amendment probable cause requirement[25] because the statute allowed arrests based on reasonable suspicion alone, and thereby promoted arbitrary police conduct.[26] Hiibel also argued that the compelled identification violated his Fifth Amendment privilege against self-incrimination.[27]

A. Procedural Posture

The Justice Court of Union Township convicted and fined Hiibel $250, holding that Hiibel's failure to disclose identification "obstructed and delayed" the officer "in attempting to discharge his duty."[28]

The Sixth Judicial District Court affirmed the decision, rejecting Hiibel's Fourth and Fifth Amendment arguments,[29] while stating that it was "reasonable and necessary" for the officer to request identification from Hiibel.[30] The district court balanced the public interests of officer and victim safety against Hiibel's Fifth Amendment right to remain silent and found in favor of the state.[31]

The Nevada Supreme Court, sitting en banc, rejected Hiibel's Fourth Amendment claim in a divided opinion.[32] The court balanced the reasonableness of the seizure against the individual intrusion, concluding that the public

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21. Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County, 124 S. Ct. 2451, 2455 (2004).

22. The Fourth Amendment provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The Fourth Amendment was applied to states through the Fourteenth Amendment Due Process Clause in *Mapp v. Ohio*, 367 U.S. 643, 646-47 (1961) and *Ker v. California*, 374 U.S. 23, 30-31 (1963).

23. The Fifth Amendment provides, in pertinent part: "No person shall be held to answer for a . . . crime . . . nor shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Fifth Amendment privilege against self-incrimination was applied to states through the Fourteenth Amendment Due Process Clause in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

24. *Hiibel*, 542 U.S. at 180-82.

25. Probable cause is required for a police officer to make an arrest or obtain a warrant. *See, e.g.*, United States v. Watson, 423 U.S. 411, 415-16 (1976).

26. *Hiibel*, 542 U.S. at 188.

27. *Id.* at 189.

28. Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County, 59 P.3d 1201, 1203 (Nev. 2002).

29. *Id.*

30. *Id.*

31. *Id.* at 1203-04.

32. *Id.* at 1203, 1207.

interest in safety outweighed the individual's personal security interest.[33] The court denied Hiibel's request for rehearing on his Fifth Amendment claim without opinion.[34] The United States Supreme Court granted certiorari.[35]

B. United States Supreme Court Decision

The Supreme Court considered Hiibel's Fourth and Fifth Amendment claims, and rejected both arguments[36] in a 5-4 decision authored by Justice Kennedy.[37] In considering Hiibel's Fourth Amendment claim, the Court first examined the reasonableness of the initial stop and then analyzed the subsequent police conduct by employing a balancing approach, weighing the intrusion on the individual against the legitimate government interests.[38] In considering Hiibel's Fifth Amendment claim, the Court asked whether the identification production is inherently incriminating and if Hiibel reasonably feared incrimination.[39] The Court concluded that when the request for identification is "reasonably related in scope to the circumstances which justified the interference,"[40] the statute's compelled response does not violate the Fourth Amendment.[41] In addition, the Court held that unless a suspect reasonably believes that the disclosure would be incriminating, the statute does not violate the Fifth Amendment.[42]

III. LEGAL BACKGROUND

A. Vagrancy and Vagueness

English vagrancy laws required suspected vagrants to provide a "good account of themselves."[43] Similar statutes have existed in the United States for loitering.[44] Vagrancy statutes began failing to pass constitutional muster

33. *Id.* at 1205 (quoting Brown v. Texas, 443 U.S. 47, 50 (1979)).

34. *See* Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County, 542 U.S. 177 at 182 (2004).

35. Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County, 540 U.S. 965 (2003).

36. *See supra* notes 21-27 and accompanying text.

37. *Hiibel*, 542 U.S. at 180.

38. *Hiibel*, 542 U.S. at 187-88 (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

39. *Id.* at 190.

40. *Id.* at 184 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

41. *Id* at 185.

42. *Id* at 191-92.

43. *Id.* at 183 (quoting 15 Geo. 2, Ch. 5 (1744)).

44. *See, e.g.*, CHI., ILL., MUNICIPAL CODE § 8-4-015 (1992) (giving police authority to disrupt loitering by persons police reasonably believe to be a street gang member, enforceable by fine up to $500 and/or six months' imprisonment). The Su-

in *Papachristou v. Jacksonville*.[45] In *Papachristou*, eight defendants (in five consolidated cases) were convicted under Jacksonville's vagrancy statute[46] under various circumstances.[47] The Court invalidated the city vagrancy law on vagueness grounds,[48] reasoning that the statute gave police too much discretion and failed to give citizens proper notice.[49] The Court expressed concern with the statute casting a "large net" for arbitrary arrests.[50] The Supreme Court's concern for overly broad statutory language has historically been evident in cases reviewing the constitutionality of legislative acts, as court re-

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preme Court, stating that the ordinance gave too much discretion to police officers and too little notice to citizens, struck down this statute. City of Chicago v. Morales, 527 U.S. 41, 64 (1999).

45. 405 U.S. 156 (1972).

46. *Id.* at 156. Actually quite specific in nature, the ordinance simply anticipated too broad a range of potential offenders. The statute provided, in pertinent part:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pick-pockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and . . . shall be punished as provided for Class D offenses."

Id. at 158 n.1 (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965)). Such offenses were punishable "by 90 days' imprisonment, $500 fine, or both." *Id.* at 158 n.1 (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 1-8 (1965)). *See also*, Alan D. Hallock, Note, *Stop-and-Identify Statutes After Kolender v. Lawson: Exploring the Fourth and Fifth Amendment Issues*, 69 IOWA L. REV. 1057, 1060 (1984). The state of Florida also had a vagrancy statute that was similar to the Jacksonville ordinance. *See* FLA. STAT. § 856.02 (1965). The United States District Court for the Southern District of Florida invalidated the state statute for being constitutionally overbroad in *Lazarus v. Faircloth*, 301 F. Supp. 266, 273 (S.D. Fla. 1969). *See also* Papachristou v. Jacksonville, 405 U.S. 156, 157 n.2 (1972).

47. Margaret Papachristou, Betty Calloway, Eugene Eddie Melton, and Leonard Johnson were arrested in the early morning for "prowling by an auto." *Papachristou*, 405 U.S. at 158. Jimmy Lee Smith and Milton Henry were arrested as vagabonds. *Id.* Henry Edward Heath was arrested for loitering and being a common thief. Thomas Owen Campbell was also charged as a common thief. *Id.*

48. *Id.* at 158.

49. *Id.* at 162, 166-70.

50. *Id.* at 162-64.

view attempts to provide an effective preventative mechanism against arbitrary police conduct.[51]

In response to the vagueness of vagrancy laws, legislatures enacted "Stop and ID" statutes designed to pass vagueness challenges.[52] Despite the revisions, the Court invalidated a "Stop and ID" statute[53] in *Kolender v. Lawson*.[54] In *Kolender*, the defendant[55] challenged the California statute on constitutional and vagueness grounds.[56] The Court held that the statute was too vague because it failed to provide a standard by which the suspect could

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51. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (invalidating a statute designed to curb protestors on vagueness grounds because it had no reasonably ascertainable standard of enforcement, and therefore was too broad).

52. Nevada's statute is set forth *supra* note 20. *See, e.g.*, the Missouri "Stop and ID" statute providing: "[The members of the police force] shall also have the power to stop any person abroad whenever there is reasonable ground to suspect that he is committing, has committed or is about to commit a crime and demand of him his name, address, business abroad and whither he is going." MO. REV STAT. § 84.710.2 (2000). *See also* "Stop and ID" statutes listed *supra* note 3, which were initially drafted to satisfy vagueness protests; Hallock, *supra* note 46 at 1062 (proposing a statute that would survive a vagueness challenge that would read: A person commits a misdemeanor if, when stopped by a peace officer having a reasonable suspicion based on articulable facts, and the reasonable inferences drawn therefrom in light of the officer's experience, that the person was about to commit, is committing, or had committed a crime, he refuses to state his name and address or provide documentation of his name and address, such as, but not limited to, a driver's license, credit card, or social security card, after being requested by requested by a peace officer to produce identification; or falsely reports his name or address to a peace officer.); UNIF. ARREST ACT § 2 (1942); MODEL PENAL CODE § 250.6 (1980) ("A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor . . . refuses to identify himself.").

53. The statute provided, in pertinent part:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . .
> (e) [w]ho loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

CAL. PENAL CODE ANN. § 647(e) (West 1970).

54. 461 U.S. 352 (1983).

55. Lawson was detained or arrested approximately fifteen times pursuant to the California law, but the trial court did not find facts concerning his specific detainments and arrests. *Id.* at 354 n.2.

56. *Id.* at 353. The Court noted that the statute in question was more than just a "Stop and ID" law, because the officer had the authority to continue questioning if she was not satisfied with the answer. *Id.* at 359.

comply with an officer's request; thereby, the statute promoted arbitrary police conduct.[57] The *Kolender* Court found it unnecessary to comment on the statute's constitutionality under the Fourth and Fifth Amendments.[58]

B. The Fourth Amendment and Terry

Terry v. Ohio revolutionized police stops; now courts examining a police stop employ a "*Terry*" analysis. The *Terry* Court required that a police officer possess specific reasonable inferences drawn from the facts at hand and his or her experience to initially stop an individual and that the officer's actions reasonably relate in scope to the initial stop.[59] A *Terry* inquiry requires a police officer to justify an initial stop based on specific and objective facts which reasonably warrant an intrusion (seizure).[60] This situation is commonly referred to as a "*Terry* stop" by courts.[61] The *Terry* holding was worded narrowly, stating:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[62]

The Court had considered a "Stop and ID" statute in the context of the Fourth Amendment before *Hiibel*. In *Brown v. Texas*,[63] two officers stopped Brown and asked him to identify himself because he "looked suspicious and [the officers] had never seen [Brown] in that area before."[64] Brown refused to identify himself and was arrested pursuant to the Texas "Stop and ID" stat-

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57. *Id.* at 361.

58. *Id.* at 362 n.10. Despite the Court's holding, the statutory language remains largely unchanged. *See* CAL. PENAL CODE ANN. § 647(e) (West 2004).

59. Terry v. Ohio, 392 U.S. 1, 19-20, 27 (1968).

60. *Id.*

61. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 440 (1984); United States v. Washington, 387 F.3d 1060, 1069 (9th Cir. 2004); United States v. Byram, 73 Fed. Appx. 586, 587 (4th Cir. 2003).

62. *Terry*, 392 U.S. at 30. This authority is known as a "*Terry* frisk," referring to the officer's ability to conduct a brief pat-down of a suspect for weapons.

63. 443 U.S. 47 (1979).

64. *Id.* at 49.

ute.[65] Brown challenged the Texas "Stop and ID" statute under the First, Fourth, and Fifth Amendments.[66] The Court reversed the conviction,[67] not because the statute itself was unconstitutional, but because the stop was not based on specific, objective facts to establish reasonable suspicion that Brown was involved in criminal activity.[68] Although *Brown* was an application of the "*Terry* stop" reasonable suspicion doctrine, not a constitutional review of the Texas "Stop and ID" statute, its *Terry* analysis is paralleled in *Hiibel*. The Court's inquiry into the reasonableness of the initial stop in *Brown* was based on the premise that an officer who lacks probable cause to detain a suspect must possess at least a "reasonable suspicion" of crime to stop him.[69] Equally important to analyzing the reasonableness of the initial stop is the requirement that the officer's actions must continue to reasonably relate to the stop's original purpose.[70] Thus, while *Brown* did not specifically address the direct constitutional attacks of Texas' "Stop and ID" statute,[71] it laid the groundwork for a Fourth Amendment claim in *Hiibel*.

After *Brown*, a split of authority developed regarding the Fourth Amendment's application to "Stop and ID" statutes. In *Oliver v. Woods*,[72] Oliver, a criminal defense attorney, was arrested by Officer Woods after their initial encounter escalated into a low-level chase.[73] Officer Woods approached Oliver in the parking lot of an automobile mechanic as Oliver dropped off his car early one morning for repair and was being picked up by his son.[74] Officer Woods was aware of recent reports of illegal oil dumping at the mechanic's business.[75] Officer Woods approached Oliver and requested identification.[76] Oliver responded by asking if it was a crime to park a vehicle, to which Officer Woods responded that it was not.[77] Oliver then drove off and was eventually pulled

65. *Id.* The Texas statute provided, in pertinent part: "A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information." *Id.* at 49 n.1 (quoting TEX. PENAL CODE § 38.02(a) (1974)).

66. *Id.* at 49.

67. *Id.* The fine for the offense was $20. *Id.*

68. *Id.* at 51-52.

69. *Id.* at 51 (citing Terry v. Ohio, 392 U.S. 1, 25-26 (1968)).

70. *Terry*, 392 U.S. at 19-20.

71. *See* Gainor v. Rogers, 973 F.2d 1379, 1386 n.10 (8th Cir. 1992) and Tom v. Voida, 963 F. 2d 952, 959 n.8 (7th Cir. 1992) (noting that up to that point the Supreme Court had not addressed the Fourth Amendment validity of a "Stop and ID" statute).

72. 209 F.3d 1179 (10th Cir. 2000).

73. *Id.* at 1182-83.

74. *Id.* at 1182.

75. *Id.*

76. *Id.*

77. *Id.*

over and arrested by Officer Woods.[78] Oliver was informed that he was being arrested for failing to idenitify himself.[79] In response, Oliver asserted his familiarity with the statute.[80] He also taunted the officers, telling them to shoot him as they threatened the use of mace.[81] The Tenth Circuit Court of Appeals upheld the invocation of the Utah "Stop and ID" law because the initial stop giving rise to the officer's identification request was based upon reasonable suspicion that Oliver was engaged in criminal activity.[82]

In *Carey v. Nevada Gaming Control Board*,[83] plaintiff James Carey sued the state gaming board under 42 U.S.C. § 1983 after his arrest and detainment for failing to identify himself pursuant to statute.[84] Before he was asked to identify himself, Carey had already been stopped and "*Terry* frisked"[85] by a gaming agent who suspected that Carey was using a counting device in the casino, but had found no probable cause of gaming law violations.[86] The Ninth Circuit Court of Appeals invalidated the Nevada statute[87] to the extent that it authorized arrest for a suspect's failure to identify himself on Fourth Amendment and *Terry* grounds, holding that the statute allowed police to arrest on a standard less than probable cause.[88] Later, during Hiibel's case, the Nevada Supreme Court found the Ninth Circuit's interpretation "unpersuasive,"[89] thereby creating a split regarding the application of "Stop and ID" statutes.

Justice White foreshadowed the connection between *Terry* reasonable suspicion doctrine and Fifth Amendment concerns in his *Terry* concurrence, stating, "[T]he person stopped is not obliged to answer . . . and refusal to answer furnishes no basis for an arrest."[90] This statement spawned certain prog-

78. *Id.* at 1183.

79. *Id.* The Utah statute provided: "A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions." UTAH CODE ANN. § 77-7-15 (1995).

80. *Oliver*, 209 F.3d at 1183 n.2.

81. *Id.*

82. *Id.* at 1190. *See also* Albright v. Rodriguez, 51 F.3d 1531, 1536-37 (10th Cir. 1995) (upholding the police officer's authority to arrest, thus satisfying probable cause, under the New Mexico "Stop and ID" statute).

83. 279 F.3d 873 (9th Cir. 2002).

84. *Id.* at 875.

85. *See supra* note 62.

86. *Carey*, 279 F.3d at 876.

87. NEV. REV. STAT. § 171.123 (1995). *See also supra* note 20.

88. *Carey*, 279 F.3d at 880-81; *see also* Martinelli v. City of Beaumont, 820 F. 2d 1491, 1494 (9th Cir. 1987) (stating that the use of a California obstruction statute to arrest a suspect for failing to identify herself during a *Terry* stop violates the Fourth Amendment).

89. Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt County, 59 P.3d 1201, 1204 (Nev. 2002).

90. Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring).

eny, such as *Berkemer v. McCarty*,[91] which addressed whether a certain custodial interrogation must provide safeguards pursuant to *Miranda*.[92] The *Berkemer* court stated, "[T]he officer may ask the detainee a moderate number of questions to determine his identity . . . [b]ut the detainee is not obliged to respond."[93]

C. The Fifth Amendment

Before *Hiibel*, the Fifth Amendment's effect on "Stop and ID" statutes was "un-chartered territory."[94] *California v. Byers*[95] highlighted two key issues in considering a Fifth Amendment challenge to a "Stop and ID" law. In *Byers*, the defendant was convicted of failing to stop and identify himself after an automobile accident,[96] as required by California law.[97] The Court upheld the statute while outlining two requirements for invoking the privilege against self-incrimination.[98] First, the danger of self-incrimination must be "substantial,"[99] and second, the evidence compelled must be "testimonial"[100] in nature.

In the Fifth Amendment context, testimonial communication has been defined as "the extortion of information from the *accused*," in "the attempt to force him to [declare] the contents of his own mind."[101] The Supreme Court has noted that the "vast majority of verbal statements [are] testimonial."[102] Although *Byers* did not address whether compelling identification was testimonial, it did state that the disclosure of a name and address is a "neutral act," thus indicating that compelled identification may not necessarily require Fifth Amendment protection.[103] Still, the Court did not expressly state that identifica-

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91. 468 U.S. 420 (1984).
92. *Id.* at 422.
93. *Id.* at 439.
94. Wayne R. Larfave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 40, 95 (1968).
95. 402 U.S. 424 (1971) (plurality opinion).
96. *Id.* at 425-26.
97. *Id.* at 426. The statute provided, in pertinent part:
> The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there . . . notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved.

CAL. VEH. CODE § 20002(a)(1)(West 1971).
98. *Byers*, 402 U.S. at 427.
99. *Id.* at 429.
100. *Id.* at 432.
101. Doe v. United States, 487 U.S. 201, 211 (1988) (emphasis added).
102. *Id.* at 213-14.
103. *Byers*, 402 U.S. at 431-34.

tion is inherently testimonial in *Byers* or *Hiibel*.[104] If addressed, the more difficult question for the Court to resolve would be whether or not compelling identification provided a substantially dangerous possibility of incrimination.

The Court has previously stated that Fifth Amendment privilege only arises when there is "reasonable ground to apprehend danger to the witness from his being compelled to answer."[105] Furthermore, the Fifth Amendment "protects against any disclosures [that] the witness reasonably believes could . . . lead to other evidence."[106] In other words, the information must "furnish a link in the chain of evidence needed to prosecute [the defendant]."[107] Despite these statements, courts generally did not consider compelled identification incriminating, even when the information was used against the defendant in subsequent proceedings,[108] and before *Hiibel*, the Supreme Court had yet to squarely confront this issue.

IV. THE INSTANT CASE

A. Majority Opinion

In *Hiibel*, the Supreme Court held that Hiibel's conviction under Nevada's "Stop and ID" statute did not violate the defendant's Fourth Amend-

104. Just months before the *Hiibel* decision, the Court discussed the meaning of "testimonial" in great detail, albeit in the context of the Sixth Amendment Confrontation Clause. *See* Crawford v. Washington, 541 U.S. 36 (2004). In addition to relying on the Webster's Dictionary definition of "testimonial," Justice Scalia, writing for the majority, noted several formulations of what may be "testimonial." *Id.* at 51-53. He indicated that a "testimonial" statement could be one in which the circumstances suggest that the statement will be used in a trial. *Id.* at 51-52. Types of testimonial statements would include testimony in a preliminary legal proceeding, and, more importantly, statements made to police during interrogations. *Id.* at 52. However, what qualifies as an "interrogation" was not defined in the opinion. "Non-testimonial" statements would include casual statements or observations made to acquaintances. *Id.* at 68 (Rehnquist, J., concurring). Although *Crawford* narrowly applied to testimony of the witness, not the testimony of the accused, the definitions of "testimonial" and "interrogation," or lack thereof, are helpful. According to Chief Justice Rehnquist's concurring opinion, the Court left a more comprehensive definition of testimonial "for another day." *Id.* at 68 (Rehnquist, J., concurring).

105. Brown v. Walker, 161 U.S. 591, 599 (1896) (quotation omitted).

106. Kastiger v. United States, 406 U.S. 441, 444-45 (1972).

107. Hoffman v. United States, 341 U.S. 479, 486 (1951).

108. *See* Farley v. United States, 381 F.2d 357, 359 (5th Cir. 1967) (holding disclosure of address later used in court not incriminating); State v. Landrum, 544 P.2d 664, 668 (Ariz. 1976) (holding disclosure of name not incriminating). *But see* People v. Berck, 300 N.E.2d 411, 415-16 (N.Y. 1973) (stating that the New York "Stop and ID" statute violated the defendant's self-incrimination right, but invalidating the statute on Fourth Amendment grounds).

ment rights,[109] nor did the statute offend Hiibel's Fifth Amendment right against self-incrimination.[110]

The Court rejected Hiibel's Fourth Amendment argument that the Court's prior opinions indicated a suspect could not be prosecuted for failing to identify himself when asked to do so by a police officer.[111] The Court reasoned that its previous statements concerning "Stop and ID" laws did not control the present case.[112]

The Court examined the historical development of "Stop and ID" statutes,[113] electing not to follow Justice White's concurrence in *Terry*[114] or its progeny, *Berkemer v. McCarty*.[115] The Court reasoned that although these cases acknowledged certain rights against the state,[116] the Nevada statute in question only required a detainee to answer as to his identity,[117] which presented a narrower issue than that discussed by Justice White in *Terry*[118] or by the court in *Berkemer*.[119]

The Court then applied a balancing approach[120] to determine the constitutionality of the statute.[121] Because the statute promoted the government's interests by immediately relating to the safety concerns of a *Terry* stop and did not alter the duration of the initial intrusion on the individual, the Court determined that the statute passed the Fourth Amendment reasonableness inquiry.[122]

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109. Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County, 542 U.S. 177, 185 (2004).

110. *Id.* at 191.

111. *Id.* at 185-89.

112. *Id.*

113. *Id.* at 182-85. *See supra* note 52 and accompanying text.

114. Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring).

115. 468 U.S. 420 (1984).

116. *Hiibel*, 542 U.S. at 187-88 (distinguishing between Fourth Amendment rights and statutory obligations by noting that, although courts have held that a citizen was not obligated to disclose his identification in the course of an encounter, the statutory obligation is a "different issue").

117. NEV. REV. STAT. § 171.123.3 (2004).

118. *See supra* note 90.

119. *Hiibel*, 542 U.S. at 187 (noting that the statements in *Berkemer* were dicta).

120. *Hiibel*, 542 U.S. at 187-88 (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979) (balancing a seizure's "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests").

121. *Id.*

122. *Id.* The Court noted that an identification request alone does not implicate the Fourth Amendment. *Id.* at 185. (citing INS v. Delgado 466 U.S 210, 216 (1984)). Here, the Fourth Amendment was implicated during the initial seizure, or *Terry* stop, based on the officer's reasonable suspicion of Hiibel's involvement in criminal activity (the reported assault). *Id.* at 188.

The Court also rejected Hiibel's claim that the statute circumvented the Fourth Amendment probable cause requirement,[123] thereby promoting arbitrary police conduct.[124] The Court explained that the *Terry* requirement that the initial stop be "justified at its inception, and . . . [be] reasonably related in scope to the circumstances which justified [it] in the first place"[125] alleviated the concern raised by Hiibel.[126] The Court noted that the identification request must be reasonably related to the stop,[127] concluding that this requirement was met because the request for identification in the present case was a "common sense inquiry" by the officer.[128]

In holding that Hiibel's Fifth Amendment rights were not violated,[129] the Court adopted neither the State's argument that the statements were non-testimonial nor Hiibel's argument that the Fifth Amendment privilege against self-incrimination prohibited compelled self-identification.[130] The Court relied on the rule that invoking the Fifth Amendment privilege against self-incrimination requires that the communication be testimonial,[131] incriminating,[132] and compelled.[133] The Court held that Hiibel's communication presented no real danger of incrimination.[134] The Court believed that Hiibel's refusal was not based on a real or appreciable fear that his name would be used to incriminate him[135] or that it would link evidence needed for prosecution,[136] because Hiibel only thought that his name was "none of the officer's business."[137] The majority provided an example of someone who would lack reasonable fear of incrimination,[138] and broadly hinted that a reasonable fear

123. *Id.*; *see supra* note 25.
124. *Hiibel*, 542 U.S. at 188.
125. Terry v. Ohio, 392 U.S. 1, 20 (1968).
126. *Hiibel*, 542 U.S. at 188.
127. *Id* at 189.
128. *Id.*
129. *Id.* at 190-91.
130. *Id.* at 189-90.
131. *See* Doe v. United States, 487 U.S. 201, 210 (1988) ("[T]o be testimonial, an accused's communication must . . . relate a factual assertion or disclose information.").
132. *See* Brown v. Walker, 161 U.S. 591, 599 (1896) (stating the "danger to be apprehended must be real and appreciable"); Kastiger v. United States, 406 U.S. 441, 444-45 (1972) (stating "[T]he Fifth Amendment privilege . . . protects against any disclosures [that] the witness reasonably believes could be used in a . . . prosecution or could lead to other evidence . . . .").
133. *Hiibel*, 542 U.S. at 189 (citing United States v. Hubbell, 530 U.S. 27, 34-38 (2000)).
134. *Id.*
135. *Id.* at 190.
136. *Id.* (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).
137. *Id.*
138. *Id.* A witness granted immunity could not reasonably fear incrimination. *Id.*

would only arise in "unusual circumstances."[139] Although the Court did not directly address the issue, the Court likely viewed the identification request both as testimonial (as it did not respond to Justice Stevens' dissenting statements on this issue) and compelled.[140] Because Hiibel's identification would not have been incriminating, the Court held that the statute did not violate the Fifth Amendment.[141]

B. Dissenting Opinions

In a dissenting opinion, Justice Stevens asserted that the Fifth Amendment did, in fact, prohibit the compelled identification disclosure.[142] Justice Stevens argued that because the Fifth Amendment protected individuals under probable cause suspicion as well as individuals engaged in a *Terry* stop,[143] Hiibel should be afforded the same protection.[144]

Justice Stevens discussed whether the communication was in fact testimonial, ultimately concluding that it was, because the question was posed by a police officer and could therefore reasonably lead to evidence in a criminal prosecution.[145] In arguing that the communication should qualify as incriminating testimony,[146] Justice Stevens questioned why, if the officer's request would not reasonably lead to criminal evidence (and thus not be incriminating), the statute's invocation would not be only a "useless invasion into privacy."[147]

In a separate dissent, Justice Breyer, joined by Justices Souter and Ginsburg,[148] argued that the Fourth Amendment and *Terry* prohibit "Stop and ID" statutes from compelling identification.[149] Justice Breyer relied heavily upon the language in Justice White's *Terry* concurrence,[150] *Brown*,[151] and *Berkemer*,[152] arguing that there was no sufficient reason to impose the identification

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139. *Id.* at 191 (citing Balt. City Dept. of Social Servs. v. Boughknight, 493 U.S. 549, 555 (1990)).

140. *Id.* The majority did leave the door open for a Fifth Amendment challenge to a "Stop and ID" statute when identification would have given police evidence to convict the defendant for another offense. *Id.*

141. *Id.* at 190-91.

142. *Id.* at 192 (Stevens, J., dissenting).

143. *Id.* at 193 (Stevens, J., dissenting).

144. *Id.* (Stevens, J., dissenting).

145. *Id.* at 194-95 (Stevens, J., dissenting).

146. *Id.* (Stevens, J., dissenting).

147. *Id.* at 195-96 (Stevens, J., dissenting).

148. *Id.* at 197 (Breyer, J., dissenting).

149. *Id.* (Breyer, J., dissenting).

150. *See supra* note 90 and accompanying text.

151. Brown v. Texas, 443 U.S. 47, 54 (1979) (noting the trial judge's inquiry: "[What is] the State's interest in putting a man in jail because he doesn't want to answer?").

152. Berkemer v. McCarty, 468 U.S. 420 (1984).

requirement, as evidenced by twenty years of decisions; the Fourth and Fifth Amendments; and administrative concerns as to how many questions an officer could conceivably ask a suspect. [153] Justice Breyer acknowledged Justice Stevens' Fifth Amendment concerns and added his own reservations about a slippery slope of officer authority to ask for a suspect's name, license number, and address.[154] Justice Breyer finally questioned the majority's opinion regarding whether identification would lead to evidence,[155] aligning with Justice Stevens' final inquiry about a "useless invasion [into] privacy."[156]

V. COMMENT

Having finally addressed the constitutionality of "Stop and ID" statutes in *Hiibel*, the Supreme Court answered certain Fourth and Fifth Amendment concerns left wanting in *Brown* and *Kolender*. The Court also left several questions open to future debate.

A. Pros and Cons of "Stop and ID"

The advantages to enforcing "Stop and ID" statutes include providing an additional enforcement and information tool to law officers, which may prevent a suspect from fleeing and even arguably increase respect for police officers.[157] While a potentially fleeing suspect may consider the ability of an officer to locate her, it is unlikely that the authority of an officer is enhanced significantly with the statutory power to gain identification. The typical citizen is unlikely to challenge an officer's authority for this seemingly minor intrusion in the first place.[158]

The overriding justification for "Stop and ID" laws is officer safety,[159] as awareness of a suspect's violent criminal background or notorious name certainly may alert an officer of a potential threat.[160] However, these concerns are limited by the Fourth Amendment requirements of reasonable suspicion and probable cause.

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153. *Hiibel*, 542 U.S. at 198-99 (Breyer, J., dissenting).

154. *Id.* at 198 (Breyer, J., dissenting).

155. *Id.* at 199 (Breyer, J., dissenting).

156. *Id.* at 196 (Stevens, J., dissenting).

157. *See* Brief of Amicus for Effective Law Enforcement, Inc., Joined by the Int'l Ass'n of Chiefs of Police, Inc., as Amicus Curiae at 8, Kolender v. Lawson, 461 U.S. 352 (1983). *See generally* Hallock, *supra* note 46, at 1073-75.

158. *See infra* notes 164-66 and accompanying text.

159. *See Hiibel*, 542 U.S. at 186.

160. A criminal background check can yield, depending on the state, records of convictions and arrests. In Missouri, citizens can request records of felonies and misdemeanors online for $5. *See generally* "CASAnet Resources: Statewide Criminal Background Check Resources," *available at* http://www.casanet.org/program-management/volunteer-manage/criminal-bkg-check.htm (last modified Apr. 2003).

The primary disadvantage of "Stop and ID" laws is the increased intrusion on individual privacy, manifested in the difficult choice between providing one's identification versus succumbing to arrest.[161] While initially the balance seems to tip in favor of the government's safety interests, in a society that has historically valued the "right to be let alone,"[162] any decrease of privacy must be viewed under great scrutiny.[163]

B. Necessity of "Stop and ID"

Before considering the constitutionality of "Stop and ID" laws, the necessity of these statutes must be questioned. Do police officers need the threat of arrest to obtain an individual's identification? The majority of persons do exactly as an officer asks, for example, consenting to a search that may or may not have any legal justification,[164] even when doing so is blatantly against the individual's interests.[165] In fact, most individuals generally do what others ask regardless of their authority, legal or otherwise.[166]

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161. *See generally*, Nicholas C. Harbist, Note, *Stop and Identify Statutes: A New Form of An Inadequate Solution To An Old Problem*, 12 RUTGERS L.J. 585 (1981).

162. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

163. Decreases in privacy and privileges are often viewed under this scrutiny by citizens seeking to support their positions with unique arguments. There is lively debate and application about how citizens should invoke their "right to be let alone," often manifested in contexts far beyond the protections of the Fourth and Fifth Amendments. For example, *compare* Morton A. Kaplan, *The Right to Be Left Alone Is the Right to Be No One*, *available at* http://www.worldandihomeschool.com/public_articles/1990/september/wis18452.asp (last visited Oct. 6, 2005), *with* Murray Sabrin, *The Right To Be Left Alone: Why Most Laws Should Be Repealed*, *available at* http://www.etherzone.com/2003/sabr070903.shtml (last visited Oct. 6, 2005) *and* Mark Skousen, *From the President's Desk – The Right to Be Left Alone*, *available at* http://www.fee.org/vnews.php?nid=5029 (last visited Oct. 6, 2005).

164. *See generally*, Marcy Strauss, *Criminal Law: Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211 (2002) (arguing that courts should consider the reality that most people feel compelled to submit to a police search, even if it will be incriminating, when considering whether consent existed, and questioning whether consent searches should even be admissible); Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory Into The Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215 (1997). For "real life" examples of this "phenomenon," *see, e.g.*, Florida v. Royer, 460 U.S. 491, 493-95 (1983); United States v. Mendenhall, 446 U.S. 544 (1980); Sibron v. New York, 392 U.S. 40, 45 (1968); *see also generally* "What is a consent search?" *available at* http://www.MSNBC.msn.com/id/4703573 (last modified April 10, 2004) (noting the belief among criminologists that citizens routinely succumb to officer requests).

165. *See, e.g.*, Williamson v. United States, 512 U.S. 594, 596 (1994) (noting that co-conspirator Harris consented to a search of his rental car, which included two suitcases containing nineteen kilograms of cocaine); *see also Newton, two others charged with*

To follow this line of reasoning and conclude that "Stop and ID" laws are unnecessary would ignore a basic purpose of statutes, particularly those in the criminal arena. Statutes are not usually directed to the typical citizen, but toward a select group who disobey the law. "Stop and ID" laws are designed to give police an enforcement tool in extreme cases, such as Hiibel's, whose absolute refusal to comply with the requests of a law enforcement officer are rare.[167] If police officers do indeed need the threat of arrest to promote respect, these laws do serve an important purpose. However, the authority of law enforcement officers is unlikely to gain additional respect with this mere enforcement tool, given most citizens' already respectful view of officer authority.

The prospect of providing officers an additional enforcement tool is somewhat frightening, given the already heightened respect of officer authority by the average citizen. The danger exists that these statutes may be used beyond the intended purpose, for example, to harass or exploit a "suspected" subject.[168] The risk of arbitrary police conduct is so apparent that several states have removed officers' ability to perform consent searches in certain situations (usually traffic stops), because individuals naturally submit to authority and this submission can be exploited.[169] Citizen-rights advocacy groups also attempt to educate the public about their rights to refuse police

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intent to sell, available at http://sports.espn.go.com/espn/print?id=1274238&type=news# (Nov. 6, 2001) (reporting that Newton consented to a search of his van that yielded 213 pounds of marijuana).

166. Professor Stephen D. Easton, University of Missouri-Columbia, offers an illustrative analogy: Every Wednesday in Columbia, Missouri, a local company hands out yellow "Ad Sheets" to passing students that include various coupons. Although no data exists on the business gained from these advertisements, the trashcans within approximately twenty feet of the "Ad Sheet" distributors seem to indicate a lack of consumer impact. Yet, despite the apparent lack of desire to possess or even briefly examine an "Ad Sheet," most students still take one when asked.

167. Indeed, most citizens do not experience major brushes with law enforcement officers. The FBI estimated slightly under 14 million arrests in 2002. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2002, available at* http://www.fbi.gov/ucr/cius_02/html/web/arrested/04-table29.html (last visited Oct. 6, 2005). The U.S. Census Bureau estimated the national population at approximately 288 million in 2002. United States Census Bureau, *Time Series of National Population Estimates, available at* http://www.census.gov/popest/archives/2000s/vintage_2002/NA-EST2002-01.html (last modified Dec. 31, 2002). Thus, even if each arrest had involved a different person, only 4.8% of the population would have been arrested.

168. This concern is magnified in the racial profiling context. If police are provided another mechanism to justify detainment, the risk of arbitrary conduct is increased.

169. *See, e.g.*, State v. Fort, 660 N.W.2d 415 (Minn. 2003); State v. Carty, 790 A.2d 903 (N.J. 2002). *See also generally*, "Newsbrief: Minnesota High Court Bars Suspicionless Consent Searches, Questioning of Motorists," *available at* http://www.stopthedrugwar.org/chronicle/286/minnesotacourt.shtml (last modified May 9, 2003) (noting that at least ten states have banned consent searches).

questioning, due to the fear of arbitrary use of police power.[170] Given the likelihood that citizens will automatically comply with an officer's request, and the availability of other safety precautions if officer safety is truly a concern (namely a *Terry* frisk for weapons),[171] it seems dangerous to grant an officer authority that can also be used to harass an individual.

C. Fifth Amendment Implications

The paramount concern arising from *Hiibel* is the infringement on citizens' rights in Fifth Amendment settings. The Court's troubling Fifth Amendment analysis has the potential for misinterpretation by courts and police. Given the Court's narrow holding, "Stop and ID" laws are essentially rendered "useless invasion[s] of privacy."[172] The Court stated that a "reasonable fear of incrimination"[173] would allow an individual to assert her Fifth Amendment privilege when asked to produce identification,[174] yet this apparently can only arise in very limited situations, given the Court's limiting "unusual circumstances" language and the Court's noting that Hiibel only *thought* his name was none of the officer's business.[175] A reasonable reader could conclude that an individual with an outstanding warrant would fear that the police officer's knowledge of the individual's identity would be incriminating and, in fact, likely to result in an arrest. The problem with this application of the incrimination privilege to "Stop and ID" laws would be that a self-aware criminal would be afforded the privilege against compelled identification while a law-abiding citizen would not because the latter would have no reason to believe that her identification is incriminating.

This reasoning is easily reconcilable on its face. Long-standing legal doctrine mandates that a reasonableness inquiry should not take into account a particular individual's unique traits.[176] Therefore, an individual's subjective

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170. *See, e.g.*, "Know Your Rights: What to do if You're Stopped by the Police," *available at* http://www.aclu.org/PolicePractices/PolicePractices.cfm?ID=9609&c=25 (last modified July 30, 2004).

171. *See supra* note 62.

172. *See supra* note 147 and accompanying text.

173. The majority's definition of incriminating (taken from *Hoffman*) appears similar to their formulation of "testimonial" in the *Crawford* case, *see supra* note 104, the only difference being that the incriminating statements will reasonably be used *against* a defendant in a legal proceeding. *See* Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County, 542 U.S. 177, 194 (2004).

174. *Hiibel*, 542 U.S. at 189.

175. *Id.* at 191 (citing Balt. City Dept. of Social Servs. v. Boughknight, 493 U.S. 549, 555 (1990)).

176. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 442 n.35 (1984) (noting that an objective test is preferable to a subjective test in determining whether a suspect felt that his freedom was so impaired as to establish custody for *Miranda* purposes, because it does not "place upon the police the burden of anticipating the frailities or

knowledge of her criminal record should have no bearing on whether or not her self-identification is incriminating. However, this logic skips a step. *Hiibel* stressed that "Stop and ID" statutes predicate an officer's identification request on *reasonable suspicion*.[177] The police officer has already made a *reasonable* determination that this individual is *suspicious* at the time identification is requested. Therefore, it seems *reasonable* for this already *reasonably suspicious* individual to conclude that she may be adding another "link to the chain of evidence" during the "Stop and ID" encounter by providing her name. Of course, this reasoning requires that a suspect's subjective knowledge be considered in a reasonableness determination.

The Court would seemingly disagree with this reasoning, as a familiar refrain in criminal law jurisprudence is that a reasonable person is not a reasonable criminal.[178] However, the Court has previously considered a suspect's "situation" in its reasonable person analysis.[179] Exactly which factors may be considered in a suspect's situation, including age, education, mental capacity, and experience (particularly in the criminal justice system), in determining reasonableness in the context of "Stop and ID" is open to debate.

The Court's potential answer, or at least guidance on this issue, may eliminate the need to consider the Fifth Amendment with "Stop and ID" laws altogether. The Court only provided an example of someone who would lack reasonable fear of incrimination (a witness granted immunity)[180] and broadly hinted that a reasonable fear would only arise in "unusual circumstances."[181] This will lead to a very narrow reading of Fifth Amendment privilege in "Stop and ID" cases.

For example, in *State v. Brown*,[182] the Ohio Appellate Court rejected defendant's argument that compelled identification would incriminate him, de-

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idiosyncracies [sic] of every person whom they question" (quoting People v. P., 233 N.E.2d 255, 260 (N.Y. 1967)).

177. *See supra* note 125-128 and accompanying text (emphasis added).

178. *See, e.g.*, Commonwealth v. Brown, 53 Va. Cir. 448, 452 (Va. Cir. Ct. 2000) (noting, "The reasonable person standard employs an objective test, not a subjective one turning on the individual's perceptions alone. It also 'presupposes an innocent person' - - that is, the test focuses not on whether an objectively reasonable criminal might feel intimidated by a conversation with a police officer, but how an *innocent citizen* would feel about it." (citing Baldwin v. Commonwealth, 413 S.E.2d 645, 648 (Va. 1992))).

179. *See, e.g., Berkemer*, 468 U.S. at 442 (adopting the objective reasonable person test in order to determine custody (*see supra* note 176), the Court explained, "the only relevant inquiry is how a reasonable man *in the suspect's position* would have understood his situation" (emphasis added)).

180. *Hiibel*, 542 U.S. at 190.

181. *Id.* at 191 (citing Balt. City Dept. of Social Servs. v. Boughknight, 493 U.S. 549, 555 (1990)).

182. No. 20336, 2004 Ohio App. LEXIS 3680 (Ohio Ct. App., Montgomery County July 30, 2004).

spite the existence of an outstanding warrant.[183] The Court noted that the disclosure of Brown's name merely alerted the police officer to the existence of the warrant, but did not furnish evidence for the underlying or a separate crime.[184] Therefore, the identification was not incriminating.[185] If such a narrow line is drawn, compelled identification will unlikely be held to "furnish a link in the chain of evidence" for a separate offense necessary to invoke the suspect's Fifth Amendment privilege.[186]

The Court's limitations on what may qualify as incriminating renders nearly meaningless its traditional formulation requiring a reasonable fear that the information will be used in a future legal proceeding.[187] The Court's narrowed view of what is an "incriminating statement" all but forecloses the claim of a lack of objective or subjective belief of incrimination. The problem here is that the inquiry into the reasonableness of human perception, which appears in nearly every area of law, has traditionally been left to the factfinder's judgment.[188] However, the Supreme Court has significantly restricted the scope of this examination by limiting the factfinder's determination as to what qualifies as incriminating.

D. Fourth Amendment Implications

Another concern raised by Hiibel is that the decision will encourage arbitrary police conduct that chisels away Fourth Amendment protection. This could potentially happen during both street encounters and in court decisions that misapply the *Hiibel* analysis.

Although arbitrary police enforcement is primarily a concern with vague statutes,[189] the *Terry* requirements that (1) the initial stop itself is based upon reasonable suspicion, and (2) any subsequent officer actions are reasonably related in scope[190] provide protection from unequal enforcement for the individual in most typical stop situations. The key statement in *Hiibel* is that compelled identification was allowed only after proper *Terry* procedure was followed.[191] Thus, a proper judicial review of a challenge to a "Stop and ID" conviction must first ask whether the stop itself was valid, and then ask if the iden-

183. *Id.* at *20-21.

184. *Id.*

185. *Id.*

186. *Hiibel*, 542 U.S. at 190.

187. *See* Kastiger v. United States, 406 U.S. 441, 444-45 (1972).

188. The reasonable person is used as a hypothetical legal standard. BLACK'S LAW DICTIONARY 1272-73 (7th ed. 1999). Reasonableness encompasses all of the surrounding circumstances. *Id.* Classic applications of this legal doctrine appear in torts, criminal law, contracts, commercial law, and property. *Id.*

189. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 358 (1983).

190. Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

191. Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt County, 542 U.S. 177, 186 (2004).

tification request was reasonably related to the stop, just as the Court did in *Brown v. Texas*.[192] These factual inquiries are essential in Fourth Amendment analysis, as demonstrated by the Supreme Court's questions of fact in *Hiibel*.[193]

This fact-driven analysis is vital to a court's understanding of *Hiibel*, but the danger of some courts missing the point is already apparent. The *Hiibel* Court noted that an officer may ordinarily *ask* for identification without implicating the Fourth Amendment,[194] a statement that has already been taken out of context. Asking for identification is premised on an entirely different authority than the question of whether or not the officer may *compel* an answer via a threat of arrest. Several courts have seized on the above language while forgetting to first employ a proper *Terry* factual analysis.[195] A police officer can *ask* an individual to do anything, just as any individual can ask another individual to do anything, but whether or not a police officer can *compel* an individual to do something is the constitutional question that courts should consider.

Another concern raised by *Hiibel* is that police may use the "Stop and ID" statutes to circumvent probable cause, or "bootstrap" up from reasonable suspicion and arrest on *Terry* stop grounds alone.[196] For example, a suspect may be stopped on reasonable suspicion grounds and ordered to produce identification in accordance with *Terry* and the state's "Stop and ID" statute. If the suspect fails to produce, he is then arrested. Probable cause has not arisen *until* the failure to produce identification. However, the identification request was predicated only upon initial reasonable suspicion. The Court correctly rejected without hesitation this "bootstrapping" concern argued by Hiibel,[197] as there is no sound legal basis for contesting a "Stop and ID" statute on this ground. The probable cause requirement is not circumvented; probable cause exists for the crime of failing to produce identification. It is always necessary to employ proper Fourth Amendment analysis, judging the situation at each new step of police conduct. When an individual is originally approached on reasonable suspicion grounds and then refuses to disclose his

192. 443 U.S. 47, 51 (1979). *See also* United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (Reinhardt, J., dissenting); Cady v. Sheahan, No. 02-C5989, 2004 U.S. Dist. LEXIS 16980 (N.D. Ill. Aug. 24, 2004); Martiszus v. Washington County, 325 F. Supp. 2d 1160 (D. Or. 2004); United States v. Smith, 332 F. Supp. 2d 277 (D. Mass. 2004); State v. Riggins, NO. C-030626, 2004 Ohio App. LEXIS 3859 (Ohio Ct. App., Hamilton County Aug. 13, 2004).

193. *See Hiibel*, 542 U.S. at 189.

194. *Id.* at 185.

195. *See, e.g.*, United States v. Foster, 376 F.3d 577, 584 (6th Cir. 2004); United States v. Castillo-Cuevas, No. 04-4155, 2004 U.S. App. LEXIS 15951, at *3 (4th. Cir. Va. Aug. 3, 2004) (per curiam); Durney v. Doss, No. 03-1975, 2004 U.S. App. LEXIS 15545, at *9 (4th Cir. Va. July 28, 2004) (per curiam).

196. *Hiibel*, 542 U.S. at 188.

197. *Id. See supra* notes 123-128 and accompanying text (discussing the reasonableness of an officer's actions in relation to the initial stop).

identification contrary to statutory requirements, probable cause arises from a different, albeit temporally related, action other than the original reasonable suspicion basis.[198] Thus, this "bootstrapping" attack on "Stop and ID" statutes is not as sound as the previous Fourth and Fifth Amendment arguments.

Before considering the impact of *Hiibel* on the drafting of future laws, consideration should be given to one peripheral issue. Officer safety was an express concern in *Hiibel*.[199] This concern, however, was somewhat overstated. In any given situation, an officer may benefit from knowing that an individual is a convicted violent felon or even a notorious speeder. However, the theory that our criminal justice system is, at least in some part, rehabilitative, ostensibly means that an individual should not automatically be watched more closely after serving a sentence.[200] The Fourth Amendment concern is that police may use an individual's identity as an element of reasonable suspicion or probable cause to justify a stop or arrest. If officer safety is truly a driving force behind "Stop and ID" laws, then, as Justice Stevens suggests, the officer may do a *Terry* frisk for weapons in the scope of a *Terry* stop.[201]

E. The Future of "Stop and ID" Laws

In this time of anti-terrorism fervor, resulting in executive-driven legislation[202] and manifesting itself in longer delays and greater intrusions at airports and borders, the judiciary has begun to weigh in on the constitutionality

198. Kolender v. Lawson, 461 U.S. 352, 366 n.4 (1983) (Brennan, J., concurring). This form of probable cause is different than the situation envisioned by Justice Brennan in his concurrence in *Kolender*. *Id.* Justice Brennan stated that the original facts giving rise to reasonable suspicion plus an individual's refusal to produce identification could create probable cause in some situations. *Id.* (Brennan, J., concurring). This is also perfectly legal, just as an ongoing criminal investigation based on reasonable suspicion may eventually provide new facts that create probable cause.

199. *Hiibel*, 542 U.S. at 186.

200. But see "Megan's Laws," requiring certain types of sex offenders to register publicly before residing in a community. *See, e.g.*, OHIO REV. CODE ANN. § 2950.02 (2004), which states, in pertinent part, "A person who is found to be a sex offender or . . . h[as] committed a child-victim oriented offense has a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government." *Id.* § 2950.02(A)(5). "The release of information . . . will further the governmental interests of public safety and public scrutiny of the criminal, juvenile, and mental health systems . . . [Offenders are required to register]." *Id.* § 2950.02. Legislatures have enacted these statutes after reasoning that the intrusion on a sex offender's privacy right is outweighed by the public's safety. *See, e.g., id.* § 2950.02.

201. *Hiibel*, 542 U.S. at 196 (Stevens, J., dissenting) (citing Terry v. Ohio, 392 U.S. 1, 25-26 (1968).

202. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, § 802, 115 Stat. 272 (2001).

of anti-terrorism laws, generally favoring government intrusion.[203] The question, in a broad sense, is whether *Hiibel* is merely an example of the Court's continued approval of the limiting of Americans' freedoms. The answer is likely yes, but only for the time being. Increased government intrusion into individual liberties is nothing new in times of crisis.[204] Although the *Hiibel* Court did not mention such buzz words as terrorism, airports, and borders, the message that Americans may have to sacrifice small privacies for the sake of government information-gathering is consistent with the current cultural climate.[205] In time, citizens will likely sense that the present direction is reactionary and push to enjoy certain freedoms again. The problem is that a "Stop and ID" statute is not likely to be challenged in the near future given the resulting relatively minimal intrustion from the decision in *Hiibel.*

More specifically, "Stop and ID" statutes should be affected in light of *Hiibel.* A narrow reading of Hiibel may mean that a "Stop and ID" statute should be confined to "Stop and tell me your name," but not "Stop, and give me your driver's license." The Court hinted that the nature of the stop may be confined to one question and answer, as it noted that the intrusion "d[id] not go beyond answering an officer's request to disclose a name . . . [it did] not alter the nature of the stop itself: it d[id] not change its duration."[206] Left unaddressed is whether the officer may ask for formal identification if she believes that the suspect is lying. *Kolender* seemed to answer no, as the Court determined that the issue of suspect reliability vests police with too much discretion.[207] A well-informed legislature would be advised to limit its "Stop and ID" statute to one question and answer in order to avoid these challenges.[208] Although additional questions would be helpful in eliciting pertinent information, and may even eventually give rise to probable cause,[209] *Kolender* restricts such questioning. Thus, if *Hiibel* limits "Stop and ID" to a compelled answer to the question, "What is your name?," and *Kolender* prohibits further questioning if

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203. *See, e.g.*, United States v. Flores-Montano, 124 S. Ct. 1582, 1587 (2004) (holding that border searches lacking any individualized suspicion are valid).

204. For an excellent overview of executive, legislative, and judicial actions that have historically limited freedom in times of crisis, *see* Geoffrey R. Stone, *Civil Liberties in Wartime*, 2003 J. SUP. CT. HIST. SOC. 215.

205. *See, e.g., id. See also generally*, 69 MO. L. REV. vol. 4 (2004) (discussing fear and risk in the times of crisis, especially since September 11, 2001).

206. *Hiibel*, 542 U.S. at 187-88.

207. *See supra* note 57.

208. According to Nevada Revised Statutes Section 171.123.3 (1995), "The officer may detain the person . . . only to ascertain his identity . . . ." Texas Penal Code Section 38.02(a) (Vernon 2003) makes the failure to provide identification a crime only if the suspect has been arrested. New York Criminal Procedure Law Section 140.50.1 (McKinney 1985) only applies to persons suspected of a misdemeanor or felony. Missouri Revised Statutes Section 84.710.2 (2000) may be challenged, as it demands not only a name but also a suspect's address and business.

209. *See supra* note 198.

the suspect is apparently lying, or the name alone provides little benefit, then "Stop and ID" laws seem to provide little return for their effort. It seems that the authority citizens *believe* police officers have, is of greater effect than the authority actually *granted* by "Stop and ID" laws.

Several alternatives to "Stop and ID" laws are available to police officers,[210] but they are neither viable nor effective. The officer may further detain the suspect or arrest her.[211] This is problematic, as the Fourth Amendment principles of probable cause combined with *Terry* would be easily violated without proper suspicion arising from newfound facts. One author recommended putting more police on the streets.[212] Such a suggestion is a simple, but often unrealistic, answer to many law enforcement problems. The best and simplest alternative to "Stop and ID" laws is to ask police officers to continue surveillance.[213] If a police officer has reasonable suspicion but lacks probable cause, instead of providing an officer with a new crime to satisfy probable cause, just ask him to wait a little longer. After all, the suspect will probably violate a traffic or pedestrian offense in the near future, at which point the fruits of probable cause may begin to blossom.

VI. CONCLUSION

The *Hiibel* decision finally addressed the constitutionality of "Stop and ID" statutes. The Court answered Hiibel's Fourth and Fifth Amendment challenges in favor of the government, with the qualification that the initial stop that eventually gives rise to the identification request must be predicated on the *Terry* reasonable suspicion requirement. Courts must also examine the continued reasonable relation of officer actions to the initial stop, but subsequent decisions appear to miss this step.

The Court did leave open the possibility of future litigation concerning what may qualify as "incriminating," particularly in the mind of a criminal suspect. However, this is unlikely to provide a winning defense argument, given the Court's narrow guidance on the topic. Also unanswered is the extent to which legislatures may empower police officers, whether limited to name request or license identification. While the actual necessity of compelled identification is questionable, the government interest in providing law enforcement an additional investigation tool has won the day.

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210. *See generally* Nicholas C. Harbist, Note, *Stop and Identify Statutes: A New Form of An Inadequate Solution To An Old Problem*, 12 RUTGERS L. J. 585 (1981).

211. *Id.* at 588.

212. *Id.* at 616.

213. *See, e.g., id.* at 587.